Supreme Court, U.S.
FILED
AUG 15 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78- 78-259

BOSTON EDISON COMPANY,

Appellant,

v.

DEPARTMENT OF PUBLIC UTILITIES OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,

Appellees.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

EDWARD B. HANIFY
WILLIAM G. MESERVE
Ropes & Gray
225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6100

VICTOR H. KAZANJIAN
JOHN J. DESMOND, III
Boston Edison Company
800 Boylston Street
Boston, Massachusetts 02199

Attorneys for Appellant, Boston Edison Company

August 15, 1978

TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	iii
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	4
STATEMENT OF THE CASE	5
Introduction	5
Proceedings Below	5
Facts	10
THE QUESTIONS ARE SUBSTANTIAL	13
I. The Return on Boston Edison's Common Equity Allowed by the Department and Upheld by the Supreme Judicial Court was Confiscatory in Violation of the Fourteenth Amendment to the United States Constitution and the Established Precedent of this Court	13
A. A Return on Equity which is insufficient to permit the Company to issue new common stock without significantly diluting the investment of existing shareholders violates the Fourteenth Amendment and conflicts with established precedent of this Court	13
B. The Supreme Judicial Court's arbitrary determination that a utility engaged in a construction program "of limited duration and unprecedented size" is not entitled to the same protection against confiscation by enforced dilution as utilities issuing stock "to allow the business to continue as usual" violates the Fourteenth Amendment	17

PAGE

II. The Supreme Judicial Court's Failure to Conduct an Independent Review as to Both Law and Fact in the Face of Explicit Claims of Confiscation and Substantial Evidence to Support Those Claims Violates the Fourteenth Amendment to the United States Constitution and the Decisions of this Court 19

III. The Supreme Judicial Court's Affirmance of the Department's So-called Mystic 7 Revenue Adjustment, After Failing to Consider the Most Recent Evidence Available to it in Reviewing that Adjustment, Violates the Fourteenth Amendment 23

IV. State Public Utility Regulation, Sanctioned by the State's Highest Court, which Fails to Fashion a Remedy which Might Restore to Boston Edison (A) Those Revenues Lost Through Prolonged and Unreasonable Delay in the Administrative and Judicial Process and (B) Those Revenues Unjustifiably Denied by the Department Violates the Fourteenth Amendment 26

CONCLUSION 32

TABLE OF CITATIONS

CASES

PAGE(S)

Allied Stores of Ohio, Inc. v. *Bowers*, 358 U.S. 522 (1959) 18

American Federation of Labor v. *American Sash and Door Co.*, 335 U.S. 538 (1949) 18-19

Arizona Grocery Co. v. *Atchison, Topeka & Santa Fe Railway*, 284 U.S. 370 (1932) 29

Atchison, Topeka & Santa Fe Railway v. *Public Utilities Commission of California*, 346 U.S. 346 (1953) 3

Bluefield Water Works & Improvements Co. v. *Public Service Commission of the State of West Virginia*, 262 U.S. 679 (1923) 3, 13, 14, 15, 16, 17

Boston Gas Co. v. *Department of Public Utilities*, 359 Mass. 292 (1971) 25

Chesapeake and Potomac Telephone Co. v. *Public Service Commission*, 330 A.2d 736 (D.C. 1974) 29-30

Cole v. *Violette*, 319 U.S. 581 (1943) 3

Department of Banking v. *Pink*, 317 U.S. 264 (1942) 3

Federal Power Commission v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) 13, 14, 15, 16, 17

Federal Power Commission v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962) 30

Lake Erie & Western Railroad v. *State Public Utilities Commission of Illinois*, 249 U.S. 422 (1919) 3

Lathrop v. *Donohue*, 367 U.S. 820 (1961) 3

Lowell Gas Co. v. *Department of Public Utilities*, 324 Mass. 80 (1949) 20

Mystic Valley Gas Co. v. *Department of Public Utilities*, 359 Mass. 420 (1971) 20

In Re New England Telephone and Telegraph Co., 131 Vt. 310, 305 A.2d 598 (1973) 29

New England Telephone and Telegraph Co. v. *Department of Public Utilities*, Mass. Adv. Sh. (1976) 2246, 354 N.E. 2d 860 ..... 15, 17, 20-21, 25

Cases (Continued)

	Page(s)
New England Telephone and Telegraph Co. v. *Department of Public Utilities*, 360 Mass. 443 (1971)	20, 25
New England Telephone and Telegraph Co. v. *Department of Public Utilities*, 327 Mass. 81 (1951)	20
New England Telephone and Telegraph Co. v. *Public Utilities Commission*, 116 R.I. 356, 358 A.2d 1 (1976)	29
New Orleans v. *Dukes*, 427 U.S. 297 (1976)	18
Ohio Valley Water Company v. *Ben Avon Borough*, 253 U.S. 287 (1920)	20
Opinion of the Justices to the House of Representatives, 328 Mass. 679 (1952)	24
Opinion of the Justices to the House of Representatives, 251 Mass. 569 (1925)	20
Pennichuck Water Works v. *New Hampshire*, 103 N.H. 49, 164 A.2d 669 (1960)	29
Potomac Electric Power Co. v. *Public Service Commission*, 380 A.2d 126 (D.C. 1977)	30, 31
F. S. Royster Guano Co. v. *Virginia*, 253 U.S. 412 (1920)	18
St. Joseph Stock Yards Co. v. *United States*, 298 U.S. 38 (1936)	21
United States v. *Civil Aeronautics Board*, 510 F.2d 769 (D.C. Cir. 1975)	30
United States v. *New York Central Railroad Company*, 279 U.S. 73 (1929)	29
Washington Gas Light Co. v. *Baker*, 188 F.2d 11 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 952 (1951)	30
West Ohio Gas Co. v. *Public Utilities Commission of Ohio*, 294 U.S. 79 (1935)	29

Statutes

	Page(s)
Massachusetts General Laws	
c. 25, § 5	7, 8
c. 25, § 18, as added by St. 1975, c. 684, § 90	6
c. 30A, § 14(7)	20, 24
c. 164, § 94	6
United States Code	
28 U.S.C. § 1257(2)	2, 3
28 U.S.C. § 2103	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-

BOSTON EDISON COMPANY,

Appellant,

v.

DEPARTMENT OF PUBLIC UTILITIES OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,

Appellees.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
OF THE COMMONWEALTH OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

Boston Edison Company ("Boston Edison" or "the Company") appeals from the decision and order of the Supreme Judicial Court of the Commonwealth of Massachusetts, entered on April 19, 1978, in which the Supreme Judicial Court affirmed in part and reversed in part certain decisions and orders of the Department of Public Utilities of the Commonwealth of Massachusetts ("Department" or "D.P.U.").[1] On June 22, 1978, the Supreme Judicial Court denied Bos-

---

[1] Five separate appeals from two decisions of the Department had been consolidated before the Supreme Judicial Court. In accordance with this Court's Rules, the two remaining parties to those appeals, General Motors Corporation and Stanley U. Robinson, III, have been designated as appellees herein.

ton Edison's timely petition for rehearing, and Boston Edison now submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and should exercise its jurisdiction to determine the substantial questions presented.

OPINIONS BELOW

In the separately bound appendix submitted herewith are the decision and order of the Supreme Judicial Court for the Commonwealth of Massachusetts in *Boston Edison Company* v. *Department of Public Utilities,* S.J.C. No. 832 (April 19, 1978). *App.* 1-54. That decision is reported at Mass. Adv. Sh. (1978) 932 and at 375 N.E.2d 305. The decisions and orders of the Department reviewed by the Massachusetts Supreme Judicial Court were issued on September 30, 1975 (and amended on October 17, 1975) in the case docketed by the Department as D.P.U. 18200/18200-A (*App.* 145-195) and on August 12, 1976, in the case docketed by the Department as D.P.U. 18515 (*App.* 75-144). The former decision is not reported, but the latter appears at 16 P.U.R. 4th 1.

JURISDICTION

This appeal is brought to review a decision and order of the Supreme Judicial Court for the Commonwealth of Massachusetts insofar as it affirms certain orders of the Department of Public Utilities establishing the rates and charges at which Boston Edison sells electricity to its retail customers.

Boston Edison has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(2) because it has challenged the validity of certain "statutes" of the Commonwealth of Massachusetts as being repugnant to the Constitution of the United States, and the Massachusetts Supreme Judicial Court has decided in favor of those statutes' validity. The

"statutes" in question are the final decisions and orders of the Department in the rate proceedings docketed by the Department as D.P.U. 18200/18200-A and D.P.U. 18515. The decision and order of the Supreme Judicial Court which upholds those "statutes" and which Boston Edison seeks to have reviewed by this Court is dated April 19, 1978. On May 1, 1978, Boston Edison filed a timely petition for rehearing with the Supreme Judicial Court (*App.* 55-69) and on June 22, 1978, that petition was denied (*App.* 70).[2] Boston Edison filed its Notice of Appeal to the Supreme Court of the United States with the Supreme Judicial Court on July 17, 1978. *App.* 71-74

The following cases sustain the jurisdiction of the Supreme Court to review such a decision of the Supreme Judicial Court on direct appeal because the Department's orders are "statutes" within the meaning of 28 U.S.C. § 1257(2): *Atchison, Topeka & Santa Fe Railway* v. *Public Utilities Commission of California,* 346 U.S. 346, 348-349 (1953); *Bluefield Water Works & Improvements Co.* v. *Public Service Commission of the State of West Virginia,* 262 U.S. 679, 683 (1923); *Lake Erie & Western Railroad* v. *State Public Utilities Commission of Illinois,* 249 U.S. 422, 424 (1919); see also *Lathrop* v. *Donohue,* 367 U.S. 820, 824-825 (1961).

In the event that appeal is not considered the proper mode of review, Boston Edison requests that the papers on which the appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103.

---

[2] While the Supreme Judicial Court's April 19, 1978 order had remanded the case to the County Court for the entry of judgment (*App.* 1), this remand is strictly a "ministerial act." See *Cole* v. *Violette,* 319 U.S. 581 (1943). As a result, the 90-day period for docketing the appeal runs in this case from the date of the Supreme Judicial Court's denial of the Company's timely petition for rehearing. See *Department of Banking* v. *Pink,* 317 U.S. 264 (1942).

QUESTIONS PRESENTED FOR REVIEW

I. Does a ratemaking decision of the Department, affirmed by the State's highest court, which establishes the allowed return on the Company's common equity violate the Fourteenth Amendment to the United States Constitution and conflict with established precedent of this Court when

A. that allowed return is acknowledged to be insufficient to permit the Company to issue new common stock without significantly diluting the investment of existing shareholders; and

B. the Court, in affirming that decision, arbitrarily determines that a utility engaged in a construction program "of limited duration and unprecedented size" is not entitled to the same protection against confiscation by enforced dilution as utilities issuing stock "to allow the business to continue as usual"?

II. Does the Supreme Judicial Court's affirmance of the Department's decision in D.P.U. 18515, after failing to conduct an independent review as to both law and fact in the face of explicit claims of confiscation and substantial evidence to support those claims, violate the Fourteenth Amendment to the United States Constitution and the decisions of this Court?

III. Does the Supreme Judicial Court's affirmance of the Department's so-called Mystic 7 revenue adjustment in D.P.U. 18515, after failing to consider the most recent evidence available to it in reviewing that adjustment, violate the Fourteenth Amendment to the United States Constitution?

IV. Does State public utility regulation, sanctioned by the State's highest court, which fails to fashion a remedy which might restore to Boston Edison (a) those revenues lost through prolonged and unreasonable delay in the administrative and judicial process and (b) those revenues unjustifiably denied by the Department violate the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE

Introduction

Boston Edison Company is an operating public utility engaged principally in the generation, purchase, transmission, distribution and sale of electrical energy. It supplies electricity at retail in Boston and some five other cities and 34 towns in eastern Massachusetts. Boston Edison presently owns and operates five steam electric generating stations (one nuclear and four oil fired) and ten combustion turbine generators, as well as a transmission system consisting of 293 miles of overhead lines and 135 miles of underground circuits and a distribution system which includes approximately 3,315 miles of overhead lines and 735 miles of underground lines. In 1975, its net investment in electric plant in service totaled over $960,000,000, and in that same year, its gross operating revenues exceeded $315,000,000.

Pursuant to Massachusetts statute, the rates and charges at which Boston Edison sells electricity to its retail customers are regulated by the Department.

Proceedings Below

On November 12, 1974, Boston Edison filed an application for a general retail rate increase of $70,000,000 with the Department. The Department docketed this rate filing,

which was based on a 1974 test year,[3] as D.P.U. 18200, and as permitted by statute (Mass. Gen. Laws c. 164, § 94), suspended those proposed rates until October 1, 1975, or until further order of the Department.[4]

Hearings on the proposed rate increase commenced on December 17, 1974. However, when it appeared by May of 1975 that proceedings before the Department would be so protracted that final decision would be unlikely before the expiration of the full ten-month suspension period, the Company filed a petition for interim rate relief. In that petition, it sought an increase of $47.7 million, subject to refund, pending a final decision by the Department on its full rate request. The Department separately docketed the Company's petition for interim rate relief as D.P.U. 18200-A, but hearings on that petition were eventually combined, in practical effect, with the hearings in the full case.

On September 30, 1975, the Department rendered a single decision in D.P.U. 18200 and 18200-A. In that decision, as subsequently amended to correct certain errors in its calculations, the Department disallowed the schedule of rates and charges filed by Boston Edison in November, 1975, and allowed the Company to put into effect new schedules of rates and charges designed to produce additional retail operating revenues of not more than $29,538,000. *App.* 190-191.

---

[3] The "test year" concept in Massachusetts rate regulation involves the use of financial data from a recent annual period on the theory that the revenue, expense and asset (rate base) figures for that period accurately reflect the utility's present financial situation and fairly predict the Company's future performance. See *App.* 24.

[4] The suspension period was the maximum then permitted by statute. That maximum suspension period has since been shortened to six months. Mass. Gen. Laws, c. 25 § 18 as added by St. 1975 c. 684 § 90.

On October 17, 1975, Boston Edison filed its petition for appeal under Mass. Gen. Laws c. 25, § 5, with the Department, and on October 20, 1975, it entered that appeal with the Supreme Judicial Court sitting in Suffolk County. In that appeal it contended that the Department's action in delaying a ruling upon the Company's petition for interim rate relief and in prolonging the hearings on the permanent rate increase deprived Boston Edison of its property without reasonable compensation in violation of the Constitution of the Commonwealth of Massachusetts and the Fourteenth Amendment to the United States Constitution. It also contended that the final decision, order and rulings of the Department were confiscatory and unlawful in violation of the Massachusetts Constitution and the Fourteenth Amendment to the United States Constitution.[5]

Also on October 17, 1975, Boston Edison filed with the Department a new application for a general retail rate increase of $48,000,000 (based upon estimated 1975 usage and a 1975 test year) to become effective on November 1, 1975. The Department docketed this new rate filing as D.P.U. 18515, and by order dated October 30, 1975, it suspended those proposed rates until July 1, 1976, or until further order of the Department.

Hearings on this second proposed rate increase commenced on January 21, 1976. After subsequently severing that portion of the case which involved questions relating to the design of the Company's proposed rates and extending the original suspension period until September 1, 1976, unless otherwise ordered by the Department, the Department rendered its decision in the rate level portion of

---

[5] Two intervenors in the proceedings before the Department, General Motors Corporation and Stanley U. Robinson, III, also filed appeals from the Department's final decision and order in D.P.U. 18200/18200-A.

D.P.U. 18515 on August 12, 1976. In that decision, the Department disallowed the schedule of rates and charges filed by Boston Edison in October, 1975, and allowed the Company to put into effect new schedules of rates and charges designed to produce additional retail operating revenues of not more than $10,960,000. *App.* 142-143.

On August 25, 1976, Boston Edison filed its petition for appeal under Mass. Gen. Laws c. 25, § 5, with the Department and with the Supreme Judicial Court sitting in Suffolk County. In this appeal it again contended that the delay by the Department in acting upon Boston Edison's application for a permanent rate increase deprived the Company of its property without reasonable compensation in violation of the Constitution of the Commonwealth of Massachusetts and the Fourteenth Amendment to the United States Constitution. Boston Edison also contended that the final decision, order and rulings of the Department were confiscatory and unlawful in violation of the Massachusetts Constitution and the Fourteenth Amendment to the United States Constitution.[6]

After unsuccessfully seeking a partial stay of the Department's order in D.P.U. 18515 from the Single Justice, the Company then filed motions to consolidate the three appeals from the Department's decision in D.P.U. 18200/18200-A and the two appeals from the Department's decision in D.P.U. 18515 in a single proceeding and at the same time requested the Single Justice to reserve and report those cases to the Full Bench of the Supreme Judicial Court. The motions to consolidate were allowed shortly thereafter, and on November 19, 1976, the five consolidated appeals, together with two motions to dismiss filed by the Department

[6] One of the intervenors in the proceedings before the Department, Stanley U. Robinson, III, also filed an appeal from the Department's final decision and order in D.P.U. 18515.

on November 1, 1976, were reserved and reported to the Full Bench. In that reservation and report, the parties agreed to narrow the issues which would be presented to the Court in the appeals arising from D.P.U. 18200/18200-A to two specific areas: (1) delay by the Department in acting upon the Company's requests for rate relief in D.P.U. 18200/18200-A; and (2) the structure or design of the rates actually allowed by the Department. The level of rates allowed in D.P.U. 18200/18200-A were no longer an issue since many of the questions relating to the Company's contention that the rates allowed by the Department in that proceeding were inadequate and confiscatory had been superseded by the Department's subsequent decision in D.P.U. 18515 which relied upon a more recent test year. The question of confiscatory rates was instead raised by means of the Company's appeal from the Department's decision in D.P.U. 18515.

On April 6, 1977, the Boston Edison appeal was argued before the Supreme Judicial Court. Following oral argument, the Court entered an interlocutory order awarding Boston Edison an additional $6,619,000 in interim rate relief pending final decision in the appeal. That final decision was rendered on April 19, 1978, and affirmed the Department's decision in D.P.U. 18200/18200-A and affirmed in part and reversed in part the Department's decision in D.P.U. 18515. Although the Court found that in D.P.U. 18515 the Company had been entitled to an amount greater than the $6,619,000 in interim relief already awarded, no additional relief was granted.[7]

[7] The Court found that the decision in D.P.U. 18515 had been superseded by a more recent case — D.P.U. 19300 — which was decided on February 28, 1978 and which relied on a 1976 test year. It held that that decision rendered prospective rate relief moot, and as a matter of law, Boston Edison could not recover retroactively the revenues lost during the period before D.P.U. 19300 was decided. *App.* 3-4, 39-40, 53.

Facts

In recent years, Boston Edison has invested substantial amounts of capital in new plant required to serve the needs of its customers. In each of the five years from 1971 through 1975, the Company invested amounts ranging from a low of $92,000,000 in 1971 to a high of $129,000,000 in 1973 in new plant. During that period, it added two major generating units to plant in service. In December 1972, its 650 MW nuclear generating station, Pilgrim 1, located in Plymouth, Massachusetts, became operational, and on June 17, 1975, its 600 MW fossil fueled steam electric generating station, Mystic 7, located in Everett, Massachusetts, went into commercial operation. At the time of the hearings in D.P.U. 18515, Boston Edison's projected construction budget for the five-year period 1976 through 1980 was even more ambitious, totaling approximately $765,000,000. That budget included funds for the Company's proposed new nuclear generating unit, Pilgrim 2, on which planning had already begun, and which was then scheduled to go into commercial operation in 1982.

This substantial growth in plant coupled with the rapid rise in expenses produced, in part, by the high rate of inflation experienced in the 1970's has made it necessary for Boston Edison to seek additional rate relief from the Department on virtually an annual basis. Such relief has been necessary so that the Company might have a reasonable opportunity to earn a fair return on its investment. Because the Department has failed to respond to these requests in an adequate and timely fashion, however, there has been marked erosion in Boston Edison's financial performance which has adversely affected its financial integrity and has shaken investor confidence in the Company.

At the hearings before the Department in D.P.U. 18515, Boston Edison produced extensive testimony describing its

depressed financial condition and the steady erosion in its operating results which had occurred during the preceding five years. Those results, which show a dramatic decline in the Company's earnings per share, a sharp increase in its dividend payout ratio, and a repeated failure of its actual return on equity to approach the return purportedly allowed by the Department, can be graphically summarized in chart form as follows:

Year	*Earnings Per Share*	*Allowed Return on Equity*	*Actual Return on Equity*	*Dividend*	*Dividend Payout Ratio*
1972	$3.55		10.48%	$2.44	70%
1973	$2.88	12.02% (D.P.U. 17273)	8.28%	$2.44	85%
1974	$2.60	13.36% (D.P.U. 17795-A)	8.16%	$2.44	94%
1975	$2.49	13% (D.P.U. 18200)	7.81%	$2.44	98%
1976[8]	$2.66	13% (D.P.U. 18515)	8.34%	$2.44	92%

In fact, the Company submitted affidavits to the Supreme Judicial Court in connection with the proceedings below which demonstrated that even if the rate increase allowed in D.P.U. 18515 had been in effect for the entire year in 1976,[9] the Company would still have required an additional $22,349,000 in gross operating revenues in 1976 merely in order to earn the rate of return purportedly allowed by the Department. Moreover, the Company contended that that return was, itself, inadequate.

---

[8] The 1976 figures are derived from an affidavit admitted into evidence by the Supreme Judicial Court which was based upon eight months' actual data and a four month forecast. In the final 1976 results, earnings were $2.72/share. Thus, the actual return on equity in 1976 was 8.53%, and the dividend payout ratio was 90%.

[9] The rate increase allowed in D.P.U. 18515 actually became effective on August 20, 1976, for all power consumed on and after August 12, 1976.

As a consequence of these inadequate financial results, Boston Edison has consistently been unable to earn a fair return on the property used in the service of its customers. Moreover, its ability to attract necessary new capital has been seriously jeopardized by its depressed financial condition. With a market price for its common stock significantly below book value,[10] additional common stock can be issued only by diluting substantially the investment of existing shareholders. The ratings of the Company's first mortgage bonds had plummeted from AAA in November, 1969, to BBB by May, 1974, and it was likely that any new bond issue for purposes other than the refunding of outstanding long term debt would trigger a further derating to BB. Such a low rating would preclude large classes of investors from purchasing the Company's first mortgage bonds. The Company's earnings had also declined so drastically that ever since 1973, it has been unable, under the terms of its Articles of Organization, to issue any substantial amount of preferred stock without the consent of the holders of the outstanding cumulative preferred stock. As a practical matter, therefore, this requirement has eliminated the issuance of new preferred stock as a meaningful financing vehicle.

In short, because of its depressed financial condition, Boston Edison has been precluded from conventional methods of financing, and it has been forced to resort to stop-gap and unusual financing devices in order to obtain the capital required to finance its necessary construction program. Its ability to continue to do so over any extended period of time is, at best, problematical.

---

[10] At year end 1976, book value was slightly higher than $32 per share, and the Company's common stock traded during that year between a high of $27⅜ and a low of $22⅜.

THE QUESTIONS ARE SUBSTANTIAL

I. The Return on Boston Edison's Common Equity Allowed by the Department and upheld by the Supreme Judicial Court was confiscatory in violation of the Fourteenth Amendment to the United States Constitution and the established precedent of this Court.

A. A Return on Equity which is insufficient to permit the Company to issue new common stock without significantly diluting the investment of existing shareholders violates the Fourteenth Amendment and conflicts with established precedent of this Court.

The basic test of a fair and reasonable return on equity capital has been well established by this Court. In *Bluefield Water Works & Improvement Co.* v. *Public Service Commission of the State of West Virginia,* 262 U.S. 679 (1923), it stated at page 693:

> "The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties."

And in *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591 (1944), the Court stated at page 603:

> "[T]he return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."

In D.P.U. 18515, the Department found a return on Boston Edison's common equity of 13% to be fair and reason-

able.[11] However, in reaching this determination, it disregarded testimony that such a return would be insufficient to support a market price for Boston Edison's common stock which was at least equivalent to its book value. Instead, it implied that such a consideration was immaterial in establishing a fair return on a company's common equity. The Department stated:

> "As to the Company's ability to attract common equity capital, we are less inclined than most of the witnesses to base our calculation on book value, though it has been taken into consideration.
>
> • • •
>
> "The Department's function here is not to protect past investors against dilution. It is to fix rates at the lowest competitive level that will yield a reasonable return and permit the Company to obtain necessary capital." *App.* 139

Boston Edison maintains that contrary to the premise underlying the Department's decision, a rate of return sufficent to support a market price for the Company's common stock which is above book value is, in fact, essential under the tests of the *Bluefield* and *Hope* cases. First, the financial integrity or financial soundness of a utility is not maintained but undermined if the market price of the stock remains below book value for any significant period of time. If the Company is going to build new plant in order to serve the future needs of its customers, it must be able to issue common stock. As soon as such stock is issued at prices below book value, however, it dilutes both the equity

[11] It might be noted that that return was only .41 percentage points above the cost to the Company of an issuance of preference stock in May, 1976 — some three months before the Department's decision. Preference stock was a new type of security for Boston Edison which the Company was forced to issue when it was unable to utilize more conventional methods of financing. It is subordinate to the Company's preferred stock, but senior to its common stock.

and future earnings per share of the existing common stockholders and confiscates their property. In short, it impairs the financial integrity of the utility.

Second, a market price for a utility's stock which is below book value impairs the Company's ability to attract capital. In order for a company to attract capital of any type, it must be able to attract equity capital. Otherwise, it will not have a sufficiently large equity base to enable it to sell senior securities. Yet as the market price for a utility stock dips below book value or remains there for any extended period of time, it becomes increasingly difficult for that Company to sell new equity capital. Under certain conditions, it may be unable to sell any new equity securities at all. Thus, a rate of return which will not support a market price above book value will not, over time, be sufficient to attract capital. In fact, it may well repulse it. As a result, the capital attraction standard of the *Hope* and *Bluefield* decisions also is not met when the Department fixes a rate of return which is designed to produce a market price for the utility's stock which is below book value.

Indeed, the Massachusetts Supreme Judicial Court, in reviewing the appropriate return on a utility's common equity in a case previous to the one at bar, specifically held that a return on equity which is not sufficient to support a market price above book value is confiscatory. It stated in *New England Telephone and Telegraph Co.* v. *Department of Public Utilities,* Mass. Adv. Sh. (1976) 2246 at 2259, 354 N.E. 2d 860 at 867:

> "If new stock yields net proceeds less than book value, the equity of existing stockholders is diluted; and forced dilution is confiscation, at least in the absence of some explanation not present in this case."

Nevertheless, in the instant case, the Supreme Judicial Court affirmed the Department's finding that a 13% return

on Boston Edison's common equity was fair and reasonable while acknowledging that that return, if earned, might not produce a market price equivalent to book value. *App.* 14 It did so by holding, in substance, that a utility like Boston Edison which needs additional capital to fund a construction program "of limited duration and unprecedented size"[12] does not enjoy the same protection from confiscation by dilution available to a utility which must go to the capital market "to allow the business to continue as usual". *App.* 15-16 Boston Edison submits that such a distinction not only violates the constitutional standards for a fair return established by *Hope* and *Bluefield,* but it is so irrational and discriminatory as to constitute a denial of equal protection.

For an electric utility, construction of new plant to meet the needs of tomorrow is just as vital as maintenance of existing plant to meet the needs of today. When the demand for electricity occurs, the plant necessary to satisfy that demand must be in place if the utility is to discharge its service obligations. Hence, the decision of whether or not a new plant should be constructed is largely nondiscretionary for an electric utility.

At the same time, the construction today of modern new generating units requires massive expenditures of capital over extended lead times. Thus, projects of "limited duration and unprecedented size" have, in effect, come to constitute business as usual in the electric utility industry. It certainly has been Boston Edison's experience over the past decade. See p. 10 *supra.*

In order to construct such substantial new plant, a utility must venture repeatedly into the financial market to attract

[12] The reference was obviously to the Company's proposed Pilgrim 2 generating station which, at the time of the hearings, was over six years away from its projected commercial operation date.

capital. It is precisely at these times that a utility most needs the protection against confiscation by dilution which a market price for its common equity at or above book value will afford. Yet inexplicably, the Supreme Judicial Court has held that the normal constitutional standards for defining a fair rate of return, as articulated in *Bluefield, Hope,* and its own *New England Telephone* decision, do not apply in such circumstances. Boston Edison contends that that ruling represents clear error of constitutional dimensions, and accordingly, this Court should exercise jurisdiction in this case to clarify the standard to be employed by a state public utility commission in determining a fair rate of return.

B. The Supreme Judicial Court's arbitrary determination that a utility engaged in a construction program "of limited duration and unprecedented size" is not entitled to the same protection against confiscation by enforced dilution as utilities issuing stock "to allow the business to continue as usual" violates the Fourteenth Amendment.

In addition to violating the normal constitutional standards for defining a fair rate of return, the Supreme Judicial Court's ruling, by artificially distinguishing between those utilities conducting "business . . . as usual" and those engaged in construction projects of "limited duration and unprecedented size", has denied those utilities in the latter category the equal protection of the laws. Why must shareholders of a utility engaged in a necessary construction program endure, without constitutional prohibition, confiscation by dilution, while those persons who happen to own shares in a utility which is merely conducting "business . . . as usual" are accorded constitutional protection against such confiscation? Boston Edison submits that no rational basis exists for such a distinction, yet the Supreme Judicial

Court has nevertheless created such an arbitrary and discriminatory standard in this case.

In making this argument, Boston Edison recognizes that "[w]hen local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations." *New Orleans* v. *Dukes,* 427 U.S. 297, 303 (1976). However, despite such deference, this Court has held that the State "must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary." *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522, 527 (1959). Or, as it stated in *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920):

> "[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Here, the Supreme Judicial Court's discrimination between utilities conducting "business . . . as usual" and those engaged in construction projects of "limited duration and unprecedented size" totally fails to meet those tests.

Equally important, this Court's traditional deference to the States in cases where economic discrimination is involved is invariably limited to instances where the discrimination results from *legislative* action. Here, however, no such action is involved. Neither the Massachusetts legislature nor its surrogate, the Department, is responsible for the arbitrary and unreasonable distinction which has been created in this case. That distinction is strictly the brainchild of the Supreme Judicial Court. Where economic discrimination results from *judicial* rather than *legislative* action, that discrimination should not receive any special deference by this Court. As Justice Frankfurter observed in a concurring opinion in *American Federation of Labor* v.

American Sash and Door Co., 335 U.S. 538, 556 (1949), "the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements, and such misconceptions are not subject to legitimate displacement by the will of the people except at too slow a pace." Thus, because unfair legislation can be removed from the statute books more readily than judicial decisions can be reversed, legislative discrimination deserves greater deference and requires less intensive judicial review. However, judicially created distinctions, such as the one involved in this case, should be carefully scrutinized, particularly in instances, such as here, where the Court has no special competence or expertise to create the challenged distinction.

In short, not only should this Court accept jurisdiction to consider whether the rate of return allowed by the Department (and upheld by the Supreme Judicial Court) was confiscatory in violation of the Fourteenth Amendment, but it should also consider whether by denying one group of utilities the right to invoke the same constitutional safeguards enjoyed by another, the Supreme Judicial Court has denied those utilities in the former classification, such as Boston Edison, the equal protection of the laws guaranteed by the Fourteenth Amendment.

II. The Supreme Judicial Court's failure to conduct an independent review as to both law and fact in the face of explicit claims of confiscation and substantial evidence to support those claims violates the Fourteenth Amendment to the United States Constitution and the decisions of this Court.

Despite Boston Edison's explicit claim that the rates established by the Department in D.P.U. 18515 were confiscatory and despite the extensive evidence which it produced at the hearings to support that contention, in reviewing the

Department's decision on all issues but rate of return, the Supreme Judicial Court failed to conduct an independent review of both law and fact. Instead, it employed the less stringent standard of review set forth in the Massachusetts Administrative Procedure Act, Mass. Gen. Laws c. 30A, § 14(7). By the process of examining each rate base and cost of service adjustment, *seriatim*, under this statute, it avoided dealing with their cumulative confiscatory impact. As a result, there was no independent review of law and fact on the confiscation issue.

As a matter of Federal Constitutional Law, it is well established that when confiscation of property is claimed as a result of action by an administrative agency, the aggrieved party is entitled to independent judicial review as to both law and fact. In *Ohio Valley Water Company* v. *Ben Avon Borough,* 253 U.S. 287 (1920), the Court stated at p. 289:

> "The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. . . . In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment." (citations omitted)

Massachusetts has adopted a similar standard when claims of confiscation are raised under the Constitution of the Commonwealth. *See, e.g., Opinion of the Justices to the House of Representatives,* 251 Mass. 569, 610-611 (1925); *Lowell Gas Co.* v. *Department of Public Utilities,* 324 Mass. 80, 88 (1949); *New England Telephone and Telegraph Co.* v. *Department of Public Utilities,* 327 Mass. 81, 85-86 (1951); *Mystic Valley Gas Co.* v. *Department of Public Utilities,* 359 Mass. 420, 424 (1971); *New England Telephone and Telegraph Co.* v. *Department of Public Utilities,* 360 Mass. 443, 449 (1971); *New England Telephone and Telegraph*

Co. v. *Department of Public Utilities,* Mass. Adv. Sh. (1976) 2246, 2249, 354 N.E. 2d 860, 863. Indeed, before departing from its traditional scrutiny in cases of this kind, the Supreme Judicial Court explicitly acknowledged in its opinion in this case that to the extent that the Company had asserted a claim of confiscation, it was entitled to an independent review as to both law and fact. *App.* 7 Nevertheless, it then failed to employ the standard of review which was required under both the United States and Massachusetts Constitutions. The Court thus discriminated against this utility not only in the formulation of the test of confiscation (see pp. 17-19 *supra*), but in the very manner in which it applied the standard of review of the constitutional issue which had previously been generally afforded to all utilities.

It may well be contended that under the United States Constitution, the scope of judicial scrutiny of administrative decisions involving confiscation of property is less stringent than is the case under the Massachusetts Constitution. In Massachusetts, a party is entitled to independent judicial review as to both law and fact whenever confiscation is *claimed,* while such review may not be obtainable under the United States Constitution "unless confiscation is clearly *established.*" *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 53 (1936) (emphasis added). However, even if that is the case, in this proceeding Boston Edison has certainly met the latter requirement.

In the hearings before the Department, Boston Edison offered extensive testimony, a fragment of which has been summarized in the statement of facts set forth herein (see pp. 10-11 *supra*), which established that the rates set by the Department were confiscatory. In addition, the updated financial data presented to the Supreme Judicial Court by affidavit showed that even if the rate increase allowed by the Department on the basis of the 1975 test year were annualized in 1976, the Company's return on equity *in 1976*

would have been only 9.41% or some $22,349,000 *below* the return purportedly allowed by the Department. There could hardly be more compelling evidence to establish confiscation. Nevertheless, that evidence was completely ignored and an improper standard of review utilized.

It appears from the language of its decision that the Supreme Judicial Court confused the distinction between the *allowed* return on equity and the return *actually earned* by the Company. For after finding the 13% return *allowed* by the Department to be adequate, the Court immediately concluded that the Company had therefore failed to establish the "indicia of confiscation." *App.* 16 However, no such conclusion could properly be drawn. Even if the *allowed* return were adequate, rates may still be confiscatory unless they also provide the Company with a reasonable opportunity to *actually earn* the return which was purportedly allowed. Here Boston Edison alleged and proved that the Department's various adjustments to rate base and cost of service deprived the Company of any reasonable opportunity to actually earn the return which the Department claimed to have allowed. Thus, the Department's allowance of a 13% return on equity was completely illusory, for through its adjustments to rate base and cost of service, it ensured that the Company could not earn it. Such a form of confiscation is just as real and just as pernicious as confiscation resulting from the allowance of an inadequate rate of return. It also deserves equivalent judicial scrutiny.

Since confiscation was claimed and its existence established by Boston Edison in this case, Boston Edison was entitled under the requirements of the Fourteenth Amendment to independent judicial review as to both fact and law with respect to the Department's various cost of service and rate base adjustments. This it was denied. It was also denied the same type of judicial review generally accorded utilities in Massachusetts by the Supreme Judicial Court

when confiscation is claimed. Therefore, this Court should exercise jurisdiction in this proceeding to clarify the standard of review which is to be exercised by a State Court in reviewing State administrative decisions where confiscation has been claimed under the United States Constitution. The matter should then be remanded to the Supreme Judicial Court for review of the various rate base and cost of service adjustments under a standard which is consistent with these Constitutional requirements.

III. The Supreme Judicial Court's affirmance of the Department's so-called Mystic 7 revenue adjustment, after failing to consider the most recent evidence available to it in reviewing that adjustment, violates the Fourteenth Amendment.

One of the principal issues raised in the proceedings before the Department in D.P.U. 18515 concerned the appropriate treatment for ratemaking purposes of the Company's Mystic #7 generating station which went into commercial operation on June 14, 1975 — midway through the 1975 test year. In discussing this issue, Boston Edison contended to the Department that on the rate base side, regardless of whether a year end or year average rate base was used, the *full* net investment in Mystic #7 should be included in rate base. On the cost of service side, the Company proposed that consistent with the inclusion of the full value of Mystic #7 in rate base, contract revenues directly attributable to that unit should be annualized (i.e. a full year's contract revenues rather than the six and a half months' revenues actually received in 1975 should be included in the revenue portion of the cost of service) and depreciation and property tax expenses associated with the plant should also be annualized.

In its decision, the Department adopted all of the adjustments to rate base and cost of service relating to Mystic #7 which had been proposed by the Company. In addition, however, it made one further adjustment to test year revenues which increased those revenues (and thereby reduced the calculation of the Company's total revenue deficiency) by some $11,200,000. That adjustment was made so as to attribute to Mystic #7 in the test year a substantial portion of the growth in retail base revenues projected for the entire Boston Edison system in the year following the test year. It was calculated by multiplying a ratio with the amount of the investment in Mystic #7 ($145,000,000) in the numerator and the total net additions to plant in service during the 1975 test year ($216,000,000) in the denominator times the total projected growth in sales for 1976 of $16,700,000.

Boston Edison contended to both the Department and the Supreme Judicial Court that that adjustment was grossly improper and confiscatory. While the Supreme Judicial Court upheld the adjustment, it did so on the basis of the narrow judicial review conducted under Mass. Gen. Laws c. 30A, § 14(7). Boston Edison believes that if the Supreme Judicial Court were required to conduct an independent review of law and fact, the Department's adjustment could not withstand that more intensive scrutiny. However, even if the Department's methodology were adopted, the evidence before the Court shows indisputably that the Company was still entitled to an additional $5,582,000 in retail revenues.

In the *Opinion of the Justices to the House of Representatives,* 328 Mass. 679, 687 (1952), the Supreme Court found that if the Court were to be free to act upon its own independent judgment as to both law and fact in an appeal where confiscation was claimed, its authority should extend "to new evidence necessary to bring the proof as nearly as

reasonably possible down to the date of final decision." It described this as:

> ". . . an unavoidable requirement, if the court is to have the necessary full power to prevent confiscation or other unconstitutional action. Otherwise, in view of the inevitable delays sometimes encountered in the decision of these cases, especially in times of rapidly changing costs, the court might sometimes be compelled to decide upon evidence already outdated and no longer applicable to the existing situation. Moreover, intervening experience may furnish the very best guide and should not be excluded from consideration, especially where violation of the Constitution is at stake." 328 Mass. at 690.

In subsequent cases, the Supreme Judicial Court has adopted a procedure whereby it has considered additional evidence which has become available following the conclusion of the hearings before the Department, subject to subsequent verification of the accuracy of that evidence by the Department. See *New England Telephone and Telegraph Co.* v. *Department of Public Utilities,* Mass. Adv. Sh. (1976) 2246, 2251, 354 N.E. 2d 860, 864; *New England Telephone and Telegraph Co.* v. *Department of Public Utilities,* 360 Mass. 443, 448 (1971); *Boston Gas Co.* v. *Department of Public Utilities,* 359 Mass. 292, 300-301 (1971).

Consistent with that approach, affidavits were submitted to the Court by Boston Edison Company in the instant case. Those affidavits were admitted into evidence by the Court. *App.* 6 One of those affidavits showed that on the basis of eight months' actual 1976 data and a four-month forecast, the growth in Boston Edison's 1976 base revenues would actually approximate only $7,900,000 — not the $16,700,000 figure which had been used by the Department in calculating its adjustment. Thus, even if the Department's methodology were adopted, merely by using the updated financial information which the Court was bound by law to consider,

the Company was still entitled to an additional $5,582,000 in retail revenues.[13]

Boston Edison submits that this Court should exercise its jurisdiction in the appeal so as to require the Supreme Judicial Court of Massachusetts to conduct an independent review of both law and fact. If it does so, the Supreme Judicial Court will be required, at the minimum, to correct the gross error in calculating the Mystic #7 revenue adjustment which manifestly was made on the record before it.

IV. STATE PUBLIC UTILITY REGULATION, SANCTIONED BY THE STATE'S HIGHEST COURT, WHICH FAILS TO FASHION A REMEDY WHICH MIGHT RESTORE TO BOSTON EDISON (A) THOSE REVENUES LOST THROUGH PROLONGED AND UNREASONABLE DELAY IN THE ADMINISTRATIVE AND JUDICIAL PROCESS AND (B) THOSE REVENUES UNJUSTIFIABLY DENIED BY THE DEPARTMENT VIOLATES THE FOURTEENTH AMENDMENT.

The Department's decision in D.P.U. 18515 was based on a 1975 test year. In that decision, it determined on the basis of those 1975 test year figures that Boston Edison was entitled to an additional $10,960,000 in retail revenues. Yet the Company was unable even to begin collecting those additional revenues until August 20, 1976 — more than eight months after the test year had expired.

[13] The amount is calculated as follows:

$\frac{\$145,000,000}{\$216,000,000} \times \$7,900,000 = \$5,293,000$, the amount of the revised adjustment. $11,200,000 (the amount of the actual adjustment) — $5,293,000 = $5,907,000, the amount by which the Department overstated cost of service revenues. After using the appropriate allocation factor of 94.5%, the amount by which the Company's retail revenue deficiency is understated as a result of this erroneous adjustment can be calculated at $5,582,000 ($5,907,000 × 94.5% = $5,582,000).

Boston Edison appealed the Department's decision to the Supreme Judicial Court and sought a partial stay of the Department's order which would enable it to put higher retail rates into effect, subject to refund in the event those higher rates were not approved. In April, 1977, the Supreme Judicial Court entered an interlocutory order which awarded Boston Edison an additional $6,619,000 in interim rate relief, pending final decision in the appeal, on account of the increase in the City of Boston property taxes which had gone into effect as of July 1, 1976.[14] Thus, nearly a year elapsed before Boston Edison was able to begin receiving revenues to meet a major expense which it had been incurring since July 1, 1976.

In the Supreme Judicial Court's April 19, 1978 decision, it determined that the Department had erroneously disallowed the Company an additional $2,360,000 in retail revenues because of its denial of an adjustment which would have permitted the Company to recover depreciation on AFUDC not normalized. See *App.* 33-40. The $2,360,000 which had been wrongfully disallowed by the Department should have been received by Boston Edison in the 1975 test year and in each following year. However, three years, in fact, elapsed before the Supreme Judicial Court ruled that Boston Edison was entitled to those revenues. Even then, the Court refused to adjust the Company's retail rates to correct the Department's error. It purported to justify its refusal on the grounds that the Department's decision in D.P.U. 19300 had superseded that in D.P.U. 18515 and thereby rendered moot any further adjustment of the rates set in D.P.U. 18515. *App.* 3-4, 39-40, 53. As a result, Boston Edison received no additional revenues on account of the Supreme Judicial Court's allowance of this adjustment until June 27, 1978, when the Court entered a stay in the Com-

[14] Boston Edison had first sought a stay to permit it to recover those additional revenues in September, 1976.

pany's appeal from the Department's decision in D.P.U. 19300. That stay finally permitted the Company to begin collecting those revenues, but it did so only from that date forward.

Moreover, if the Supreme Judicial Court had considered the most recent evidence available to it in reviewing the Mystic #7 revenue adjustment, it would have concluded that the Company had been entitled to an additional $5,582,000 in retail revenues at least from the date of the Department's decision in D.P.U. 18515 (August 12, 1976), if not from the June 14, 1975 date when Mystic #7 went into commercial operation. However, because of the Court's failure to consider that evidence, those revenues were lost to the Company until D.P.U. 19300 was decided on February 28, 1978.

In short, because of the long delay in obtaining an initial decision from the Department and the additional delay in securing review of that decision by the Supreme Judicial Court, Boston Edison lost substantial revenues to which it was clearly entitled. And throughout the period that it was deprived of those revenues, Boston Edison was earning a return which was substantially below the return allowed by the Department and substantially below the level of confiscation. See pp. 10-11 *supra.*

Similar losses were incurred in D.P.U. 18200-18200-A, particularly because of the Department's calculated and unreasonable delay in acting upon the Company's petition for interim rate relief. That petition had been filed in that case at a time when all of the evidence required by the Department to render a decision on the petition had been received, but no decision was forthcoming for another four and a half months.[15] The decision, when finally rendered, established

[15] Based on the additional revenues finally allowed by the Department, that delay cost the Company between $8,000,000 and $12,000,000.

indisputably that the rates in effect during the period that the petition had been pending were confiscatory.

Boston Edison argued to the Supreme Judicial Court that it was constitutionally entitled to recover the revenues lost as a result of unwarranted delays in the administrative process. The Court rejected that argument, together with any claim which might have resulted from the Court's own failure to act promptly on the appeal, with the summary statement that "[t]he law is clear that Boston Edison may not receive additional relief retroactively. See *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry.,* 284 U.S. 370, 386 (1932); *New England Tel. & Tel. Co.* v. *Public Utils. Comm'n.,* [116] R.I. [356] (1976)." (Footnoting, for the latter case, 358 A. 2d 1, 20 (1976)). *App.* 53; see also *App.* 4. While Boston Edison concedes that there are, indeed, cases which may be cited for the proposition that rates are to be prospective in nature only, there are also others which recognize the principle, aptly stated by Justice Cardozo, that "[p]resent confiscation is not atoned for by merely holding out the hope of a better life to come." *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio,* 294 U.S. 79, 83 (1935).

In *United States* v. *New York Central Railroad Company,* 279 U.S. 73 (1929), this Court held that the Interstate Commerce Commission had authority to make a rate increase operative retroactively from the date of the railroad's petition for increase. It stated: "[R]easonable compensation for the years thus occupied [by regulatory investigation] is a constitutional right of the companies no less than it is for the future." 279 U.S. at 79. Similar results have been reached by other courts. See, *e.g., Pennichuck Water Works* v. *New Hampshire,* 103 N.H. 49, 164 A.2d 669 (1960); *In Re New England Telephone and Telegraph Co.,* 131 Vt. 310, 305 A.2d 598 (1973); *Chesapeake and Potomac Telephone Co.* v. *Public Service Commission,* 330 A.2d 236 (D.C.

1974). See also *United States* v. *Civil Aeronautics Board,* 510 F.2d 769, 775 (D.C. Cir. 1975).

Most recently, the District of Columbia Court of Appeals in *Potomac Electric Power Co.* v. *Public Service Commission,* 380 A.2d 126 (1977), held that where a public utility commission had established confiscatory rates, the amount of the loss experienced by the utility during the period when those rates were in effect could be calculated and recovered prospectively over a suitable period of time by means of a temporary rate surcharge.[16] The Court stated:

> "The nature of such relief would remain prospective. In calculating the lost revenues, the Commission will place itself in a position to provide the rate relief it legally was bound to give at the time of its now-vacated opinion of November 12, 1975. To do otherwise would be to give perpetual legal effect to an unlawful order, and to unnecessarily and unwarrantedly penalize Pepco, its investors, and indeed its customers for the passage of time necessitated by appellate review of that unlawful order." 380 A.2d at 148.

The District of Columbia Court of Appeals pointed out in its decision that in previous cases Federal Courts had ordered refunds of excessive amounts collected during the course of a rate proceeding or collected as a result of invalid rate increases allowed by a Commission. See *Federal Power Commission* v. *Tennessee Gas Transmission Co.,* 371 U.S. 145 (1962); *Washington Gas Light Co.* v. *Baker,* 188 F.2d 11, 23 (D.C. Cir. 1950), *cert. denied,* 340 U.S. 952 (1951). It observed:

> "Reviewing courts with the power to direct refunds on the basis of invalid orders also have the concomitant power to direct consideration of the possible need for surcharges on the basis of such orders, for to function otherwise would be to permit the perpetuation of demonstrably confiscatory rates, rendering appellate review but a meaningless exercise." 380 A.2d at 149.[17]

[16] In its appeal to the Supreme Judicial Court, Boston Edison had suggested this approach as a possible means of dealing with the problem of confiscation by delay.

In light of the current conflict in authority on this question, Boston Edison submits that this Court should exercise its jurisdiction in this appeal so as to reverse the Supreme Judicial Court's holding that it has no authority to award some form of appropriate rate relief in instances where delays in the administrative and judicial process have resulted in demonstrable and substantial confiscation of a utility's property in violation of the Fourteenth Amendment. Unless an appropriate remedy can be fashioned in cases such as this, revenues to which a utility is constitutionally entitled will be irretrievably lost.

[17] The cogency of the reasoning of the District of Columbia Court of Appeals in the *Potomac Electric Power Co.* case is unaffected by the fact that that Court subsequently allowed a petition for rehearing. No final decision has been rendered as of this writing.

CONCLUSION

For the above stated reasons, Boston Edison Company respectfully submits that this Court should note probable jurisdiction to determine the substantial questions presented.

Respectfully submitted,

EDWARD B. HANIFY
WILLIAM G. MESERVE
Ropes & Gray
225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6100

VICTOR H. KAZANJIAN
JOHN J. DESMOND, III
Boston Edison Company
800 Boylston Street
Boston, Massachusetts 02199

Attorneys for Appellant,
Boston Edison Company